No. 97-770

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In The

Supreme Court of the United States

October Term, 1997

TEXACO, INC.,

Petitioner,

vs.

MATTHEWS SMITH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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(1) The Fifth Circuit's unpublished opinion in this case of course cannot create a conflict between the circuit courts.[1] But Texaco has never urged a conflict in the circuits as a reason to grant its petition. The company relied on other grounds: (i) the conflict between the district court's orders (and the circuit court's affirmance of those orders) and a decision of this Court; and (ii) the need to settle an unresolved question concerning the power of federal courts, an issue of substantial importance to the civil justice system.

Respondents are simply wrong to say that an unpublished decision cannot be contrary to a decision of this Court.[2] Were it otherwise, lower courts could insulate from final review flagrantly illegal or unconstitutional rulings. That is not, nor could it be, the law.

Moreover, this Court has long reserved to itself the right to grant certiorari in order to provide the lower courts with guidance on a question of substantial importance to the civil justice system.[3] As set out in the petition, just such a question is presented here.[4]

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1. Brief in Opposition at 4.

2. *Id.*

3. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (addressing scope of courts' inherent powers); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 (1980) (same); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964) (considering construction and validity of a rule of civil procedure); *Sacher v. United States*, 343 U.S. 1, 4-5 (1952) (addressing scope of contempt power); ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE §§ 4.11, 4.15 (7th ed. 1993).

4. Petition for a Writ of Certiorari at 11-16.

(2) Texaco insistently raised at every stage of the proceedings below the question of whether the district court had the authority to issue the disputed injunctions. Respondents' suggestion to the contrary is preposterous.[5] Subsection F of Texaco's brief on appeal reads as follows: "The district court lacked authority to make the document-preservation order directed to Texaco."[6] The brief then argues that authority for the district court's orders cannot be found in the MANUAL FOR COMPLEX LITIGATION (*id.* at 22-23), any rule of civil procedure (*id.* at 23-26), or within the ambit of courts' "inherent powers" (*id.* at 26-28). Texaco did argue that the original injunction failed to satisfy traditional requirements for such relief and that the "document-preservation order" was issued without compliance with Rule 65. But those arguments followed and were alternative to the principal lack-of-authority point.

(3) Respondents insist that the power to enjoin free use of a party's property *pendente lite* — so long as the property may contain relevant evidence — derives "obviously" from the federal rules of discovery.[7] They further assert that "[t]he court's [sic] power to compel the preservation of evidence is central to the court's [sic] ability to administer justice."[8] Neither assertion is supported by citation to authority, for good reason: no such authority exists. Courts and commentators have debated whether the power to *sanction* the destruction of evidence is found in the rules of civil procedure or must be grounded in the courts' inherent powers. And some commentators have decried the lack

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5. Brief in Opposition at 4-5.

6. Brief of Defendant-Appellant Texaco, Inc. at 22.

7. Brief in Opposition at 6.

8. *Id.* at 11.

of a rule or statute that would confer the injunctive power claimed by the district court in this action.[9] But nobody has contended that evidence-preservation injunctions are anything other than a recent innovation in American law. If the power to issue such injunctions is as "obvious" and as "central" to the administration of justice as the respondents assert, Texaco can only marvel at their utter invisibility in Anglo-American jurisprudence for over two hundred years.[10]

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9. Dale A. Osterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, TEX. L. REV. 1185, 1239 (1983).

10. *See Entick v. Carrington*, 19 St. Tr. 1030 (1765), which remains good law in England today. The court's reasoning is equally applicable here:

> What would the parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

19 St. Tr. at 1067.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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